

On appeal, appellant contends that the overpayment incorporated an incorrect period and, therefore, the amount was incorrect. She further contends that the Office's negligence and her reliance on misinformation from the employing establishment caused the overpayment.

FACTUAL HISTORY

The Office accepted that on July 21, 2007 appellant, then a 48-year-old visitor use assistant, sustained a lumbar sprain when she turned and twisted her back while in the performance of her work duties at the employing establishment. It paid her continuation of pay from July 21 through September 15, 2007.

On October 31, 2007 appellant filed a claim for wage-loss compensation (Form CA-7) for the period September 27 through December 14, 2007. Her temporary position ended effective September 27, 2007. By letter dated February 20, 2008, the Office informed appellant that she would receive \$5,641.44 in gross compensation for the period September 27, 2007 to February 16, 2008. It advised her that she would receive \$1,105.68 in gross monthly compensation commencing February 17, 2008 at the three-fourths compensation rate on the periodic rolls.

In an August 18, 2008 letter, appellant requested that her compensation payments be temporarily suspended as she planned to return to work at the employing establishment in a seasonal short-term position on August 21, 2008. She was scheduled to work until late October 2008. Appellant sent a copy of her letter to the employing establishment. The Office continued to pay compensation for temporary total disability through April 2, 2009.

On April 9, 2009 the Office issued a preliminary determination that appellant received an overpayment in the amount of \$9,336.57 because she returned to work on August 21, 2008 but, continued to receive full compensation benefits for total disability through April 11, 2009. It stated that she received net compensation for the period August 3, 2008 to April 11, 2009 in the amount of \$10,047.36. The Office indicated that appellant was entitled to receive net compensation during the period August 3 to 17, 2008 in the amount of \$710.79. It subtracted the amount she should have received, \$710.79, from the amount she actually received, \$10,047.36, to determine that the amount of the overpayment was \$9,336.57. The Office found that appellant was without fault in creating the overpayment. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a prerecoupment hearing within 30 days if she disagreed with the fact or amount of the overpayment or if she believed that recovery of the overpayment should be waived. The Office requested that she complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents.

On April 29, 2009 appellant requested a telephone conference with the Office. She disagreed with the amount of the overpayment and requested waiver of recovery of the overpayment. Appellant contended that accompanying correspondence dated September 1 and 5, 2008 indicated that she advised Cindy Whitten, an employing establishment employee, about her request to have her compensation benefits temporarily suspended due to her return to temporary clerical work. She again requested that her compensation benefits be temporarily suspended during a telephone conversation with the Office on September 5, 2008. Appellant advised the Office that her position would end on October 31, 2008. She provided the Office with information regarding a contact person in the employing establishment human resources office. The Office agreed to notify appellant by mail about the necessary payment changes. Appellant did not receive any information from the Office or employing establishment regarding

changes, adjustments or cancellations to her monthly compensation payments. She telephoned the Office again on October 31, 2008 to advise that her position had ended. The Office did not respond. Appellant believed that she was entitled to receive the total disability compensation payments while she worked since she had provided proper notification and had not received documents from the Office which indicated otherwise. She also believed that since her temporary clerical position did not involve her regular work duties, she was entitled to continue to receive total disability compensation until her medical treatments were complete and a physician had released her to return to full-duty work.

Appellant contended that recovery of the overpayment would be against equity and good conscience as she notified both the Office and employing establishment about her return to work. She used the compensation she received to pay bills and expenses in support of her family and to make personal purchases and home repairs and improvements that she would not have made if she had not received the compensation payments. Repayment of the overpayment would cause financial hardship as appellant's husband had not worked since January 31, 2009 and he was only receiving minimal state unemployment benefits. Appellant was using their savings to pay bills and noted that she had been threatened by creditors to pay medical bills. She and her husband did not have any health insurance and they drove older cars that needed repairs. Appellant contended that the period of the overpayment should be from August 21 to October 31, 2008, the period she was employed in the temporary clerical position.

Appellant submitted a Form OWCP-20 dated April 29, 2009 in which she reported monthly income of \$1,103.35 which primarily represented her husband's state unemployment benefits. She had monthly expenses of \$3,297.11. Appellant had \$26,147.50 in financial assets. She submitted financial records in support of the financial information shown on the Form OWCP-20.

A June 4, 2009 memorandum of a June 3, 2009 telephone conference indicated that appellant returned to light-duty work on August 21, 2008 with no wage loss. Appellant stated that her husband's unemployment benefits shown on the Form OWCP-20 was the only source of monthly income. She had monthly expenses of \$1,747.12 and assets in the amount of \$32,437.42. Appellant stated that Ms. Whitten advised her that since she continued to have residuals of her employment-related injury, she was entitled to receive compensation benefits from the Office. An Office senior claims examiner responded that she was given incorrect information. The claims examiner advised appellant that she would continue to be entitled to medical benefits as long as she had residuals of her employment injury but, if she returned to work with no wage loss, then she was not entitled to monetary benefits due to temporary total disability. Appellant stated that she could only repay \$25.00 per month commencing in August 2009 if waiver was not granted.

In a July 1, 2009 decision, the Office finalized the overpayment determination in the amount of \$9,336.57. It denied waiver of recovery of the overpayment, finding that although appellant's monthly expenses exceeded her monthly income, her assets of \$32,437.42 exceeded the resource base of \$8,000.00 for an individual with a spouse. The Office directed recovery of the overpayment at the rate of \$100.00 per month.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹ A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.²

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision. The Office found an overpayment of compensation based on appellant's receipt of compensation for total disability after she returned to work on August 21, 2008. While appellant does not dispute that an overpayment of compensation occurred she contends that the correct period of the overpayment is from August 21 to October 31, 2008, the period in which she temporarily worked in a clerical position, and, therefore, the amount of the overpayment is incorrect.

The record reflects that appellant returned to work for two months in a clerical position from August 21 to October 31, 2008. The record further reflects that appellant continued to receive payments for compensation for temporary total disability during that period and continuing through April 11, 2009. The Board notes that the Office did not properly evaluate the sporadic/intermittent nature of appellant's return to work.

Office procedures indicate that earnings of a sporadic or intermittent nature which do not fairly and reasonably represent the claimant's loss of wage-earning capacity should be deducted from continuing compensation payments using the formula in *Albert C. Shadrick* with past earnings being declared an overpayment.³ Sporadic or intermittent earnings should not be used as the basis for a loss of wage-earning capacity determination, but may be used to help establish the kind of work the claimant can perform.⁴ The procedures state that any worksheet used to calculate the deduction of sporadic earnings should be marked clearly with the words actual earnings calculation, not a loss of wage-earning capacity determination.⁵ The Board notes that an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination only for the period appellant had actual sporadic and intermittent earnings.⁶ Because the Office failed to follow its procedures in handling

¹ 5 U.S.C. § 8102(a).

² *L.S.*, 59 ECAB 350 (2008). See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

³ 5 ECAB 376 (1953).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d)(3) (June 1996); *L.S.*, *supra* note 2.

⁵ *Id.*

⁶ See *L.S.*, *supra* note 2; *Lawrence D. Price*, 47 ECAB 120 (1995).

sporadic or intermittent employment, a finding of overpayment is premature. The case is remanded to the Office for proper evaluation of the sporadic earnings of appellant under the Office procedure manual to be followed by an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant received a \$9,336.57 overpayment of compensation for the period August 21, 2008 to April 11, 2009.⁷

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2009 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further action consistent with this decision of the Board.

Issued: December 23, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁷ In view of the Board's decision, the issues regarding the Office's denial of waiver and recovery rate are moot.